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IN THE SUPREME COURT OF FLORIDA

REBECCA LEE FALCON,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. SC13-865

RESPONDENT'S ANSWER BRIEF

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PRELIMINARY STATEMENT

Respondent, the State of Florida, the Appellee in the District Court of Appeal (DCA) and the prosecuting authority in the trial court, will be referenced in this brief as Respondent, the prosecution, or the State. Petitioner, Rebecca Lee Falcon, the Appellant in the DCA and the defendant in the trial court, will be referenced in this brief as Petitioner or by proper name.

The record on appeal consists of one volume, which will be referenced according to the respective number designated in the Index to the Record on Appeal. "IB" will designate Petitioner's Initial Brief. Each symbol will be followed by the appropriate page number in parentheses.

All emphasis through bold lettering is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

The State rejects the Petitioner's statement of the case and facts as it contains numerous facts which are irrelevant to the legal issue before this Court. The State provides the following state of the case and facts:

In December of 1997, a grand jury indicted Petitioner for the offense of first degree premeditated murder and attempted armed robbery with a firearm. (I.109-110). Following a jury trial, petitioner was convicted as charged and sentenced to life in prison without the possibility of parole for the murder and 207.5 months in prison for the robbery. (I.111-118).

On August 22, 2012, petitioner filed a motion for post conviction relief and/or to correct illegal sentence. (I.1-6). In the motion petitioner claimed that she committed the murder when she was 15 years old. Petitioner argued that she was entitled to relief pursuant to Miller v. Alabama, 132 S.Ct. 2455 (2012), the United States Supreme Court held that the imposition of a mandatory life sentence without a possibility of parole sentence for a juvenile without review of the juvenile offender's individual characteristic violated the Eighth Amendment's prohibition on cruel and unusual punishment. Accordingly, petitioner requested that the trial court vacate her life sentence and provide her with a full individualized sentencing hearing. (I.2).¹ The State responded to petitioner's motion that both the Third District Court of Appeal and later the First District Court of Appeal held that Miller was not retroactively applicable to cases that were final before it was issued. (I.138-139). Petitioner filed a reply arguing that Miller should be applied retroactively. (I.181-196).

The trial court denied the motion finding that:

In the motion, the Defendant alleges that pursuant to the United States Supreme Court's recent decision in Miller v. Alabama, - U.S. -, 132 S.Ct. 2455 (2012), her 1999 sentence of life imprisonment without the possibility of parole for first-degree murder is unconstitutional. Because the First DCA has held that Miller does not apply retroactively to cases that were final before Miller was

¹ Petitioner also included the material for her petition for executive clemency to demonstrate her maturity and provide mitigation. (I.15-130). However, because the court ruled on this solely on the legal issue of whether Miller v. Alabama, applies retroactively, that material is not relevant to the issue in this appeal.

issued, the instant motion is due to be denied. See Gonzalez v. State, - - So. 3d - -, 37 Fla. L. Weekly D2490 (Oct. 24, 2012); Geter v. State, - So. 3d - , 37 Fla. L. Weekly D2283 (Fla. 3d DCA 2012).

(I.197).

Petitioner appealed the circuit court's order to the First District Court of Appeal. The First District issued an opinion stating that:

Rebecca Lee Falcon currently serves a mandatory life sentence without parole for the first-degree murder she committed in 1999 when she was 15 years old. In August 2012, she filed a motion for postconviction relief and/or to correct illegal sentence, arguing that the United States Supreme Court's recent decision in Miller v. Alabama, - U.S. - , 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012), should be given retroactive effect and that she should be resentenced following an individualized sentencing hearing.

The trial court properly denied relief, citing this Court's decision in Gonzalez v. State, 101 So.3d 886 (Fla. 1st DCA 2012) as well as the Third District's decision in Geter v. State, - So.3d - , 2012 WL 4448860, 37 Fla. L. Weekly D2283 (Fla. 3d DCA Sept. 27, 2012), both of which held that Miller does not apply retroactively to cases on collateral review. This Court has decided the retroactivity issue, and we see no reason to further pass upon the question other than to reaffirm that Gonzalez controls in this district. However, we recognize that federal and state court decisions are sharply divided on this issue. Because the question is one of great public importance that merits possible consideration by our supreme court via its discretionary jurisdiction, we affirm based on Gonzalez and certify the following question pursuant to Florida Rule of Appellate Procedure 9.030(a)(2)(A)(v):

WHETHER THE RULE ESTABLISHED IN MILLER V. ALABAMA, - U.S. - , 132 S.Ct. 2455, 2460, 183 L.Ed.2d 407 (2012), "THAT MANDATORY LIFE WITHOUT PAROLE FOR THOSE UNDER THE AGE OF 18 AT THE TIME OF THEIR CRIMES VIOLATES THE EIGHTH AMENDMENT[]," SHOULD BE GIVEN RETROACTIVE EFFECT?

Falcon v. State, 111 So. 3d 973 (Fla. 1st DCA 2013).

SUMMARY OF ARGUMENT

Issue I:

Petitioner first argues that because of her individual characteristics including her background, maturity, and facts regarding the crime, a life without parole sentence for her would be unconstitutional under Miller v. Alabama, 132 S.Ct. 2455 (2012). This question is beyond the certified question. This question is premature as well. The sole issue before this Court is whether Miller applies retroactively. If Miller does not apply retroactively, there is no need to address this claim, and if Miller does apply retroactively, then this Court will need to remand this case back to the trial court to address this issue.

Issue II:

Petitioner contends that retroactive application of Miller is required because the United States Supreme Court consolidated the case of Jackson v. Hobbs with Miller v. Alabama. In Miller, the United States Supreme Court addressed two separate cases involving 14 year-olds convicted of murder and sentenced to mandatory sentences without parole. While Miller was on direct appeal, in the companion case, Jackson v. Hobbs, Jackson's sentence had already been affirmed by the Arkansas Supreme Court. The United States Supreme Court granted certiorari review in both cases and consolidated the cases for review. However, the issue in Jackson, like Miller, was whether the Eighth Amendment prohibited a life without parole sentence for juveniles involved in a homicide offense as Graham v. Florida, infra had not addressed that issue.

The issue of retroactivity was not addressed. Because Jackson was seeking relief under an extension of Graham, and it is most likely that Graham will be applied retroactively as it appears to have categorically prohibited a specific punishment, the simple fact that the United States Supreme Court address the Eighth Amendment issue without addressing retroactivity, does not mandate that Miller must be applied retroactively. Instead, this Court must look to whether Miller qualifies for retroactive application under Witt v. State, 387 So.2d 922 (Fla.1980).

Issue III:

Miller v. Alabama, does not qualify for retroactive application under this Court's test announced in Witt v. State. Miller v. Alabama, does emanate from the United State's Supreme Court and it is constitutional in nature as it involves whether a sentence violates the prohibition of cruel and unusual punishment. However, Miller does not constitute a development of fundamental significance. A change of law that constitutes a development of fundamental significance if it removes from the state the authority to regulate certain conduct or impose certain penalties or if it is a change of sufficient magnitude to require retroactive application.

While the Miller decision does involve sentencing, it did not remove the State's authority or power to impose a sentence of a life without the possibility of parole. The United States Supreme Court did not preclude a life sentence without parole, but the Court instead, changed the procedures which are required in order

to impose a life without parole sentence. Pursuant to Miller the sentencing judge must first consider the juveniles diminished culpability, heightened capacity for change, and other factors related to youth before imposing a life without parole sentence.

Miller is also not a change of sufficient magnitude to require retroactive application. To determine if a change of law is of significant magnitude this court must consider the purpose to be served by the new rule, the extent of reliance on the old rule and the effect of the rule on the administration of justice. The purpose to be served by the new constitutional rule is the foremost factor. A new rule is usually given retroactive effect when it effects the truth-finding function of a trial which raises serious questions about the accuracy of a guilty verdict. However, if a new rule marginally implicates the reliability of the factfinding process, but is primarily designed to foster other constitutional or policy concerns, the rule does not necessitate retroactive application. The purpose of Miller is to provide a new process in juvenile homicide sentencing, but it does not affect the determination of guilt or innocence of a juvenile defendant.

The second prong of the test is the extent of reliance on the old rule. Historical reliance on the old rule does not weigh in favor of applying the new rule retroactively. In 1994, the Legislature amended the sentencing statute to make persons convicted of capital felonies involving death ineligible for parole. Thus, for 18 years trial courts have been imposing life

without parole sentences on juveniles convicted of first degree murder.

The third prong of the test is the effect that retroactive application of the rule will have on the administration of justice. The new procedures under Miller will call for a sentencing hearing presenting evidence and testimony similar to that of a sentencing hearing in a capital murder case in which the death penalty is imposed. Expert testimony on the defendant's mental state and maturity will most likely have to be presented and countered. Moreover, unless the sentencing hearing follows soon after a trial, facts surrounding the crime, medical examiner's testimony as to the injuries, statements made by the defendant, and any other type of evidence which would be relevant to the trial court's sentencing decision will have to be presented. Accordingly, retroactive application of Miller will greatly impact the administration of justice. Thus, Miller does not require retroactive application under Witt.

Issue IV:

Appellant also claims that Miller v. Alabama is retroactive under the federal test in Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). States are not required to use the Teague test for retroactivity. This Court has not adopted the Teague test, but instead relies on Witt. Nevertheless, even if this Court were to examine the Miller decision under the Teague standard, petitioner would not be entitled to any relief. Pursuant Teague, a new rule should be applied retroactively if it places its

conduct beyond the power of the criminal law-making authority to regulate or if the new rule if the observance of procedures that are implicit in the concept of ordered liberty. The infringement of the rule must seriously diminish the likelihood of obtaining an accurate conviction and the rule must alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding.

Again, Miller did not prohibit the imposition of a life without parole sentence on a juvenile, but instead, changed the procedures in which it could be imposed. Miller did not effect the accuracy of the guilty verdict. Although Miller is highly important, it is not a watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding. Thus, even if this Court were to apply the Teague standard of retroactivity, petitioner would not be entitled to relief.

ARGUMENT

ISSUE I

WHETHER THIS COURT MAY REVIEW WHETHER OR NOT PETITIONER'S LIFE WITHOUT PAROLE SENTENCE IS UNCONSTITUTIONAL UNDER MILLER V. ALABAMA, - U.S. - , 132 S.CT. 2455 (2012), AS APPLIED TO HER? (Restated)

Petitioner appears to be arguing in this issue that because of her individual characteristics including her background, maturity, and facts regarding the crime, a life without parole sentence for her would be unconstitutional under Miller v. Alabama, 132 S.Ct. 2455 (2012). This question is beyond the certified question and is premature as well.

In 1997, petitioner committed the first degree premeditated murder and attempted armed robbery with a firearm. (I.109-110). In 2012, petitioner filed her motion for post conviction relief and /or to correct illegal sentence. (I.1-6). Although petitioner included the material for her petition for executive clemency to demonstrate her maturity and provide mitigation, (I.15-130), prior to the time in which the State filed a response, the Third District had issued Geter v. State, 115 So. 3d 375 (Fla. 3d DCA 2012), holding that Miller v. Alabama, did not apply retroactively. Moreover, before the trial court could rule, the First District issued Gonzalez v. State, 101 So. 3d 886 (Fla. 1st DCA 2012), which also held that Miller did not apply retroactively. "[I]n the absence of interdistrict conflict, district court decisions bind all Florida trial courts." Pardo v. State, 596 So. 2d 665, 666 (Fla. 1992). See Miller v. State, 980 So. 2d 1092, 1094 (Fla. 2d

DCA 2008) ("And, because the district courts of appeal in Florida are intended to be courts of final appellate jurisdiction, the opinion of a district court is binding on all trial courts in the state. Pardo v. State, 596 So.2d 665, 666 (Fla.1992). If there is unresolved conflict between the district courts, the trial court is bound by the precedent in its own appellate district. Id. at 666. Because the trial court was bound by Geter and Gonzalez, neither the State nor the trial court attached any documents or even addressed the specific merits of petitioner's claim. Accordingly, this issue is premature. The sole issue before this Court is whether Miller applies retroactively. If Miller does not apply retroactively, there is no need to address this claim, and if Miller does apply retroactively, then this Court will need to remand this case back to the trial court to address this issue.

ISSUE II

WHETHER THIS COURT IS REQUIRED TO APPLY MILLER V. ALABAMA RETROACTIVELY BECAUSE THE UNITED STATES SUPREME COURT CONSOLIDATED ITS REVIEW OF MILLER WITH JACKSON V. HOBBS? (Restated)

Standard of Review

This is a question of law, and therefore is subject to de novo review.

Argument

Petitioner contends that retroactive application of Miller is required because the United States Supreme Court consolidated the cases of Jackson v. Hobbs and Miller v. Alabama. In Miller, the United States Supreme Court addressed two separate cases involving 14 year-olds convicted of murder and sentenced to mandatory life sentences without parole. While Miller was on direct appeal, the companion case, Jackson v. Hobbs, Jackson's sentence had already been affirmed by the Arkansas Supreme Court. Miller, 132 S.Ct. at 2455. Jackson then filed a state habeas petition claiming that his mandatory life sentence without parole violated the Eighth Amendment under Roper v. Simmons, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005). While the denial of his state habeas petition was on appeal, the United States Supreme Court issued Graham v. Florida, 560 U.S. 48 (2010), which precluded life without the possibility of parole sentences for juveniles not involved in a homicide. Arkansas denied Jackson's claim finding that Roper and Graham were 'narrowly tailored' to their contexts: 'death-penalty cases involving a juvenile and life-imprisonment-without-parole cases for nonhomicide offenses involving a juvenile.'" Miller at

2461, citing Jackson v. Norris, 378 S.W.3d 103 (Ark. 2011). The United States Supreme Court granted certiorari review. Miller, 132 S.Ct. 2455 at 2463.

The issue in Jackson, like Miller, was whether the Eighth Amendment prohibited a life without parole sentence for juveniles involved in a homicide offense as Graham had not addressed that issue. Jackson v. Arkansas, 2011 WL 5322575 (appellate petition). The issue of retroactivity was not addressed. Because Jackson was seeking relief under an extension of Graham, and it is most likely that Graham will be applied retroactively because it appears to have categorically prohibited a specific punishment, the simple fact that the United States Supreme Court addressed the Eighth Amendment issue without addressing retroactivity, does not mandate that Miller must be applied retroactively.

In a related issue addressing whether a prisoner can file a successive petition for writ of habeas corpus, the United States Supreme Court has stated that a new rule "becomes retroactive, not by the decisions of the lower court or by the combined action of the Supreme Court and the lower courts, but simply by the action of the Supreme Court." Tyler v. Cain, 533 U.S. 656, 663, 121 S. Ct. 2478, 2482, 150 L. Ed. 2d 632 (2001). The Court further stated that "[t]he only way the Supreme Court can, by itself, lay out and construct a rule's retroactive effect, or cause that effect to exist, occur, or appear, is through a holding. The Supreme Court does not make a rule retroactive when it merely establishes principles of retroactivity and leaves the application of those

principles to lower courts.” Id. The Court stated that “a new rule is not made retroactive to cases on collateral review unless the Supreme Court holds it to be retroactive.” Id. (footnote omitted).

The Eleventh Circuit and the Fifth Circuit have concluded that Miller is not retroactive and have precluded prisoners from filing a successive federal habeas petition to raise that issue. See In re Morgan, 713 F.3d 1365 (11th Cir.2013) (concluding that Miller is not retroactive), reh'g en banc denied, 717 F.3d 1186; Craig v. Cain, No. 12-30035, 2013 WL 69128 (5th Cir. Jan.4, 2013). The State notes that several of the other circuit courts have found that habeas petitioners have made a prima facie showing Miller is retroactive to allow the prisoner to file the habeas petition to raise the issue. However, those courts have cautioned that “[i]n granting authorization we join most other circuits in adopting the proposition that a prima facie showing in this context is ‘simply a sufficient showing of possible merit to warrant a fuller exploration by the district court[.]’” Johnson v. United States, 720 F.3d 720, 721 (8th Cir. 2013). See In re Pendleton, 2013 WL 5486170, (3d Cir. 2013) (“we conclude that Petitioners have made a prima facie showing that Miller is retroactive.”).

Petitioner relies on Justice Alito’s dissenting opinion in Miller when he refers to the Miller case and the Jackson case as two “carefully selected cases.” Petitioner argues that the carefully selected language “makes clear to the discerning reader that the rule laid down in Miller and Jackson applied whether or

not the mandatory life-without-parole-sentenced juvenile's case was still in the pipeline." Petition at 13-14, quoting Judge Benton's concurrences in Falcon, 111 So.3d at 975. However, when viewed in context, Justice Alito's statement had nothing to do with retroactivity. Justice Alito stated that:

Today, that principle is entirely put to rest, for here we are concerned with the imposition of a term of imprisonment on offenders who kill. **The two (carefully selected) cases before us concern very young defendants,** and despite the brutality and evident depravity exhibited by at least one of the petitioners, it is hard not to feel sympathy for a 14-year-old sentenced to life without the possibility of release. But no one should be confused by the particulars of the two cases before us. **The category of murderers that the Court delicately calls "children" (murderers under the age of 18) consists overwhelmingly of young men who are fast approaching the legal age of adulthood. Evan Miller and Kuntrell Jackson are anomalies; much more typical are murderers like Donald Roper, who committed a brutal thrill-killing just nine months shy of his 18th birthday.** Roper, 543 U.S., at 556, 125 S.Ct. 1183.

Seventeen-year-olds commit a significant number of murders every year, and some of these crimes are incredibly brutal. Many of these murderers are at least as mature as the average 18-year-old. See Thompson, 487 U.S., at 854, 108 S.Ct. 2687 (O'Connor, J., concurring in judgment) (noting that maturity may "vary widely among different individuals of the same age"). Congress and the legislatures of 43 States have concluded that at least some of these murderers should be sentenced to prison without parole, and 28 States and the Federal Government have decided that for some of these offenders life without parole should be mandatory. See Ante, at 2471 - 2472, and nn. 9-10. The majority of this Court now overrules these legislative judgments.

Miller v. Alabama, 132 S.Ct. 2455, 2489 (2012) (Alito, dissenting) (footnotes omitted, emphasis added). Thus, it is clear that Justice Alito's reference to the "careful selection" regarding of the two cases referred to the fact that the cases were selected

based upon the young age and minimal culpability of the defendants, not based on the fact that one case was a direct appeal and one case was on post-conviction review. Therefore, the fact that the Court consolidated its review of whether the holdings of Graham applied to homicide cases in both Miller and Jackson, is not dispositive as to whether or not Miller should be applied retroactively, especially when retroactivity was not an issue in the Jackson case.

ISSUE III

WHETHER THE UNITED STATES SUPREME COURT DECISION OF MILLER V. ALABAMA, 132 S.CT. 2455 (2012), APPLIES RETROACTIVELY UNDER WITT V. STATE, 387 So.2d 922, 931 (Fla.1980)? (Restated)

Standard of Review

The issue of whether Miller v. Alabam, 132 S.Ct. 2455 (2012), is applied retroactively is a question of law, and therefore is subject to de novo review.

Argument

In Miller v. Alabama, 132 S.Ct. 2455 (2012), the United States Supreme Court held that the imposition of a mandatory life sentence without a parole for a juvenile without review of the juvenile offender's individual characteristic violated the Eighth Amendment's prohibition on cruel and unusual punishment. Petitioner contends that her life without parole sentences for the 1997 first degree murder conviction is illegal in violation of Miller. However, petitioner's conviction was final in 2001, when her direct appeal concluded. Falcon v. State, 781 So. 2d 1086 (Fla. 1st DCA 2001). The United States Supreme Court issued Miller on June 25, 2012. Therefore, the question before this Court is whether Miller v. Alabama, qualifies for retroactive application.

In Witt v. State, 387 So.2d 922, 931 (Fla.1980), this Court set forth its test for determining whether or not a change of law requires retroactive application. This Court stated that an alleged change of law will not be considered for retroactive application unless the change: "(a) emanates from this Court or the United States Supreme Court, (b) is constitutional in nature, and

(c) constitutes a development of fundamental significance." Id. at 931. Witt is based upon the considerations set forth in Stovall v. Denno, 388 U.S. 293 (1967), and Linkletter v. Walker, 381 U.S. 618 (1967), in which the United States Supreme Court looked to the purpose to be served by the new rule, the extent of the reliance on the old rule, and the effect on the administration of justice of a retroactive application of the new rule. Stovall, 388 U.S. at 297, 87 S.Ct at 1967. This Court has "rarely f[ound] a change in decisional law to require retroactive application." Hughes v. State, 901 So.2d 837, 846 (Fla. 2005).

Miller v. Alabama does emanate from the United States Supreme Court, and it is constitutional in nature as it involves whether a sentence violates the prohibition of cruel and unusual punishment. However, Miller does not constitute a development of fundamental significance. "A change of law that constitutes a development of fundamental significance will ordinarily fall into one of two categories: (a) a change of law which removes from the state the authority or power to regulate certain conduct or impose certain penalties, or (b) a change of law which is of sufficient magnitude to require retroactive application." Hughes v. State, 826 So.2d 1070, 1073 (Fla. 1st DCA 2002).

While the Miller decision does involve sentencing, it did not remove the State's authority or power to impose the penalty of life without parole. The United States Supreme Court specifically rejected Miller's argument that "the Eighth Amendment requires a categorical bar on life without parole for juveniles[.]" Miller,

132 S.Ct at 2469. The Court, instead, stated that “[b]ut given all we have said in Roper,² Graham,³ and this decision about children's diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon.” Id. More specifically, the Court stated that “[**a]lthough we do not foreclose a sentencer's ability to make that judgment in homicide cases**, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.” Miller, 132 S.Ct at 2455 (emphasis added; footnote omitted). Accordingly, the United States Supreme Court did not preclude a life sentence without parole, but the Court instead, changed the procedures which are required in order to impose a life without parole sentence. As the First District recognized in Washington v. State, 103 So. 3d 917, 919 (Fla. 1st DCA 2012) “far from categorically barring a penalty for a class of offenders as it did in Roper and Graham, the Supreme Court in Miller ruled its decision ‘mandates only that a sentencer follow a certain process - considering an offender's youth and attendant characteristics - before imposing a particular penalty,’ emphasizing that ‘youth matters for purposes of meting out the law's most serious punishments.’” Id. at 919, citing, Miller at 2471. Although the First District recognized that “if the state

² Roper v. Simmons, 543 U.S. 551 (2005).

³ Graham v. Florida, 130 S.Ct. 2011 (2010).

again seeks imposition of a life sentence without the possibility of parole, the trial court must conduct an individualized examination of mitigating circumstances in considering the fairness of imposing such a sentence. **Under Miller, a sentence of life without the possibility of parole remains a constitutionally permissible sentencing option.**” Id. at 920 (emphasis added). Neely v. State, 38 Fla. L. Weekly D851 (Fla. 3d DCA Apr. 17, 2013) (“Because Miller did not categorically bar a life sentence without parole for a juvenile, this decision does not preclude the trial court from again imposing a life term without possibility of parole should the trial court upon reconsideration deem such sentence justified.”); Hernandez v. State, 117 So. 3d 778, 782 (Fla. 3d DCA 2013) (“Although Miller does not bar a trial court from imposing a sentence of life without the possibility of parole, it requires the sentencer ‘to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.’”).

Thus, Miller’s change in the sentencing procedures for juveniles is more akin to the effect Apprendi had on the sentencing procedures. The United States Supreme Court held in Apprendi v. New Jersey, 530 U.S. 466 (2000), that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” This Court stated that “[t]he decision in Apprendi was intended to guard against erosion of the Sixth Amendment’s guarantee of the right to jury

trial, by requiring that a jury decide the facts supporting a sentence that exceeds the statutory maximum." Hughes v. State, 901 So. 2d 837, 841 (Fla. 2005). Nevertheless, this Court stated that Apprendi "is procedural, as is clear from the Supreme Court's statement that its concern was with the adequacy of New Jersey's criminal procedure." Id. at 841. See Curtis v. United States, 294 F.3d 841, 843 (7th Cir.) (stating that "Apprendi is about nothing but procedure—who decides a given question (judge versus jury) and under what standard (preponderance versus reasonable doubt)"), cert. denied, 537 U.S. 976, 123 S.Ct. 451, 154 L.Ed.2d 334 (2002).

Likewise, Miller did not remove a state's authority to impose a life without parole sentence on a juvenile, but instead, it modified the procedure in which it could be done. As the Third District explained, the Miller Court held that "under Eighth Amendment guarantees, 'a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles.'" Geter v. State, 115 So. 3d 375, 376 (Fla. 3d DCA 2012), citing, Miller, at 2475. "[T]he determination in Miller focuses on a new procedure for criminal sentencing." Id. "Miller mandates only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty." Id. at 377. "Clearly and unequivocally, the Supreme Court distinguished between the substantive determinations of a categorical bar prohibiting a 'penalty for a class of offenders or type of crime,' as in Roper and Graham, and the procedural determination in Miller that merely

requires consideration of mitigating factors of youth in the sentencing process." Id. Thus, after Miller, a trial court can no longer impose a life without parole sentence on a juvenile without first holding an individualized sentencing hearing. There are various factors which the sentencing court must explore before imposing a life without parole sentence, but after exploring those factors the trial court may impose a life sentence. Consequently, Miller does not meet the first category of change of law that constitutes a development of fundamental significance.

Hence, the question is whether it is a change of law which is of sufficient magnitude to require retroactive application. Very few cases have been of sufficient magnitude to require retroactive application. Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (Fla. 1963), is an example of a law change which was of sufficient magnitude to require retroactive application. Witt, at 929. However, this Court also said:

In contrast to these jurisprudential upheavals are evolutionary refinements in the criminal law, affording new or different standards for the admissibility of evidence, for procedural fairness, for proportionality review of capital cases, and for other like matters. **Emergent rights in these categories, or the retraction of former rights of this genre, do not compel an abridgement of the finality of judgments. To allow them that impact would, we are convinced, destroy the stability of the law, render punishments uncertain and therefore ineffectual, and burden the judicial machinery of our state, fiscally and intellectually, beyond any tolerable limit.**

Witt, at 929-930 (emphasis added). For example in Linkletter v. Walker, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965), "the Supreme Court refused to give retroactive application to the

newly-announced exclusionary rule of Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961).” Witt, at 929 n.26.

To determine if a change of law is of significant magnitude this court “must consider the three factors of the Stovall/Linkletter test: (a) the purpose to be served by the new rule; (b) the extent of reliance on the old rule; and (c) the effect of retroactive application of the rule on the administration of justice.” Hughes v. State, 901 So.2d 837, 840 (Fla. 2005).

“Foremost among these factors is the purpose to be served by the new constitutional rule,” Desist v. United States, 394 U.S. 244, 249, 89 S.Ct. 1030, 1033, 22 L.Ed.2d 248 (1969). However, “the purpose of a new constitutional rule requires its retroactive application ‘is necessarily a matter of degree.’” Brown v. Louisiana, 447 U.S. 323, 328, 100 S.Ct. 2214, 2219, 65 L.Ed. 159 (1980), citing, Johnson v. New Jersey, 384 U.S. 719, 729 (1966). “Where the major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials, the new rule has been given complete retroactive effect.” Brown v. Louisiana, 447 U.S. 323, 328, 100 S.Ct. 2214, 2219, 65 L.Ed. 159 (1980), citing Williams v. United States, 401 U.S. 646, 653 (1971). Nevertheless, “Constitutional protections are frequently fashioned to serve multiple ends; while a new standard may marginally implicate the reliability and integrity of the factfinding process, it may have been designed primarily to foster other, equally fundamental values

in our system of jurisprudence. Not every rule that 'tends incidentally' to avoid unfairness at trial must be accorded retroactive effect." Brown v. Louisiana, 447 U.S. at 328-329, 100 S.Ct. at 2220, citing Gosa v. Mayden, 413 U.S. 665, 680 (1973). The Court stated that "[t]he extent to which a condemned practice infects the integrity of the truth-determining process at trial is a 'question of probabilities.'... And only when an assessment of those probabilities indicates that the condemned practice casts doubt upon the reliability of the determinations of guilt in past criminal cases must the new procedural rule be applied retroactively." Brown v. Louisiana, 447 U.S. at 329, 100 S.Ct. at 2220 (citations omitted; footnotes omitted).

"First, the purpose to be served by Miller is a procedural change in law that provides for a new process in juvenile homicide sentencing." Geter, at 378. A new juvenile sentencing procedure, "[l]ike other decisions that have declined to retroactively apply constitutional determinations, Miller does not affect the 'determination of guilt or innocence of a juvenile defendant' and 'does not address a miscarriage of justice or effect a judicial upheaval' regarding substantive criminal law." Geter, at 378-379, citing, Hernandez v. State, 61 So.3d at 1144, 1150 (2011). "Also, the procedural determination in Miller fails to 'cast serious doubt on the veracity or integrity of the original trial proceeding.'" Geter, at 379, citing, Witt, 387 So.2d at 922.

The purpose of Miller is similar to the purpose of Apprendi which changed the sentencing procedure for criminal defendants.

"The decision in Apprendi was intended to guard against erosion of the Sixth Amendment's guarantee of the right to jury trial, by requiring that a jury decide the facts supporting a sentence that exceeds the statutory maximum." Hughes v. State, 901 So.2d 837, 841 (Fla. 2005). The purpose of Miller is to provide a procedure for a judge to consider mitigation such as age and maturity in deciding a juvenile murder's sentence. Geter, at 380 ("Miller's purpose was to provide a procedure for considering mitigating factors of youth before the possibility of imposing a decreased sentence under the statutory maximum. On the other hand, Apprendi's purpose was a decisional change in procedure for imposing sentences that exceeded the statutory maximum after finding an element of the offense for which the defendant was already convicted."). Nevertheless, "in weighing the State's interest in the finality of convictions, the Florida Supreme Court determined that the procedural rule in Apprendi did not require retroactive application." Geter, at 381.

In fact, the Third District correctly determined that "[c]ompared to Apprendi, retroactive application is even less warranted with respect to Miller. For example, unlike Apprendi, Miller does not require the sentencer to conduct an inquiry into an element of the offense already determined by a jury beyond a reasonable doubt for which the offender was convicted. Likewise, Miller does not require jury submission of factors to be found beyond a reasonable doubt. Also, contrary to Apprendi, Miller's procedural rule does not require the sentencer to consider any

factor other than what was submitted to the jury and proved by a reasonable doubt for the conviction. As such, the procedural determination in Miller is even less intrusive on the judicial system than the determination in Apprendi." Geter, at 381-382.

Appellant's reliance on Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) and Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987), is misplaced. In Lockett, the United States Supreme Court held that in capital cases, the sentencer cannot be precluded from considering mitigation evidence. Following Lockett, in Hitchcock, the United States Supreme Court invalidated Florida's capital sentencing scheme which only allowed the judge and the advisory jury to consider statutory authorized mitigation. In Riley v. Wainwright, 517 So.2d 656 (Fla.1987), this Court determined that Lockett was entitled to retroactive application. In Foster v. State, 518 So.2d 901, 902 n.3 (Fla. 1987), this Court appears to have applied Hitchcock retroactively by determining that Lockett was not procedurally barred as set forth in Riley. Neither case provides any type of analysis or review of the Witt factors. However, in Riley, this Court stated that "[u]nder our capital sentencing statute, a defendant has the right to an advisory opinion from a jury." Riley, at 658. "[A] Florida capital sentencing jury's recommendation is an integral part of the death sentencing process." Id. at 657. In fact, a jury's recommendation of life must be given 'great weight' by the sentencing judge. A recommendation of life may be overturned only if 'the facts suggesting a sentence of death [are] so clear and

convincing that virtually no reasonable person could differ.'" Id. at 657, citing Tedder v. State, 322 So.2d 908, 910 (Fla. 1975). Thus, under the scheme in Hitchcock, the jury and judge were misled that they were precluded from considering mitigating evidence which they were actually required to consider. Thus, the preclusion of this evidence affected the reliability or accuracy of the sentencing phase determination. As this court stated "[i]f the jury's recommendation, upon which the judge must rely, results from an unconstitutional procedure, then the entire sentencing process necessarily is tainted by that procedure." Riley at 659.

To the contrary, again "the purpose to be served by Miller is a procedural change in law that provides for a new process in juvenile homicide sentencing." Geter, at 378. A new juvenile sentencing procedure, "[l]ike other decisions that have declined to retroactively apply constitutional determinations, Miller does not affect the 'determination of guilt or innocence of a juvenile defendant' and 'does not address a miscarriage of justice or effect a judicial upheaval' regarding substantive criminal law." Geter, at 378-379, citing, Hernandez v. State, 61 So.3d at 1144, 1150 (2011). In fact, the United States Supreme Court has also refused to give retroactive application to numerous other rights. For example, in Linkletter v. Walker, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965), "the Supreme Court refused to give retroactive application to the newly-announced exclusionary rule of Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961)." Witt, at 929 n.26. In fact, the United States Supreme Court has even held that the right

to a jury trial is not retroactive. DeStefano v. Woods, 392 U.S. 631, 88 S.Ct. 2093, 20 L.Ed.2d (1968) (refusing to apply the right to a jury trial retroactively because there were no serious doubts about the fairness or the reliability of the fact finding process being done by the judge rather than the jury); Cf. Brown v. Louisiana, 447 U.S. 323, 328, 100 S.Ct. 2214, 2219, 65 L.Ed.2d 159 (1980) (giving retroactive application to Burch v. Louisiana, 441 U.S. 130 (1979), which held that a conviction by a nonunanimous six-person jury violated the right to a jury trial because the conviction by non-unanimous six-member jury raised serious questions about the accuracy of the guilty verdicts). The United States Supreme Court has even refused to apply new rules law involving penalty phases retroactively in death penalty cases. Schriro v. Summerlin, 542 U.S. 348, 349, 124 S. Ct. 2519, 2521, 159 L. Ed. 2d 442 (2004) (holding that Ring v. Arizona, 536 U.S. 584 (2002), did not apply retroactively to cases already final on direct review); Michigan v. Payne, 412 U.S. 47, 93 S. Ct. 1966, 36 L. Ed. 2d 736 (1973) (holding that the limitation established in North Carolina v. Pearce, 395 U.S. 711 (1969), to guard against vindictiveness in resentencing procedure does not receive retroactive effect); Lambrix v. Singletary, 520 U.S. 518, 521, 117 S. Ct. 1517, 1521, 137 L. Ed. 2d 771 (1997) (finding that Espinosa v. Florida, 505 U.S. 1079 (1992), which held that in a capital case in a "weighing State" where the sentencing judge is required to give deference to a jury's advisory sentencing recommendation, then neither the jury nor the judge is constitutionally permitted to

weigh invalid aggravating circumstances, was not entitled to retroactive application). Likewise, the purpose of Miller, to provide a procedure for a juvenile defendant to provide mitigation does not merit retroactive application.

Moreover, even though, a pre-Miller, juvenile murder would not get the same remedy as guaranteed by Miller, they are not without any opportunity whatsoever to present mitigation evidence to commute their sentence. A pre-Miller juvenile defendant could still apply for executive clemency. While the State does realize that it is presenting the evidence to the clemency board rather than a trial judge and the standards used in each proceeding may be somewhat different, nonetheless, the refusal to apply Miller retroactively does not foreclose a juvenile's ability to ever present mitigating evidence in attempt to obtain relief from the life sentence. Brown v. Louisiana, 447 U.S. 323, 329, 100 S.Ct. 2214, 2220 (1980) ("Not every rule that 'tends incidentally' to avoid unfairness at trial must be accorded retroactive effect. ... So, too, additional safeguards may already exist that minimize the likelihood of past injustices."); Johnson v. New Jersey, 384 U.S. 719, 729, 86 S.Ct. 1772, 1779 (1966) ("We are thus concerned with a question of probabilities and must take account, among other factors, of the extent to which other safeguards are available to protect the integrity of the truth-determining process at trial.").

The second prong of the Stovall/Linkletter test is the extent of reliance on the old rule. In 1994, the Legislature amended the statute to make persons convicted of capital felonies involving

death ineligible for parole. Laws of Florida 94-228. Thus, for 18 years trial court have been imposing life without parole sentences for juveniles convicted of first degree murder. "Florida law has long permitted courts to impose life sentences on juveniles tried as adults after conviction of first-degree murder. Indeed, Miller does not foreclose such a sentence, but only requires consideration of mitigating factors of youth. Florida courts' 'longstanding, reasonable reliance upon this rule weighs heavily against the retroactive application' of the determination in Miller. Geter at 382-383, citing, Barrios-Cruz v. State, 63 So.3d 868, 872 (Fla. 2d DCA 2011). "Again, such historical reliance on the old rule does not weigh in favor of applying the new rule retroactively." Hughes v. State, 826 So.2d 1070, 1074 (Fla. 1st DCA 2002). "Because the Miller determination is a procedural change in criminal law and has implications that could not have been accounted for in the past, reliance on the old rule weighs against retroactive application." Geter, at 383.

The third prong of the Stovall/Linkletter test is the effect that retroactive application of the rule will have on the administration of justice. The new procedures under Miller will call for a sentencing hearing in which evidence and testimony similar to that presented in the sentencing phase in a capital murder case is required. Expert testimony on the defendant's mental state and maturity will most likely have to be presented and countered. Moreover, unless the sentencing hearing follows soon after a trial, facts surrounding the crime, medical examiner's

testimony as to the injuries, statements made by the defendant, and any other type of evidence which would be relevant to the trial court's sentencing decision will have to be presented, and such evidence may not be available after the passage of time.

As the Third District stated "retroactive application of Miller would be far-reaching and adverse to the administration of justice." Geter, at 383. "Such retroactive application would 'destroy the stability of the law, render punishments uncertain and therefore ineffectual, and burden the judicial machinery of our state, fiscally and intellectually, beyond any tolerable limit.'" Chandler v. Crosby, 916 So.2d 728, 731 (Fla. 2005), citing, Witt, 387 So.2d at 929-30. "Applying Miller retroactively would undoubtedly open the floodgates for postconviction motions where at the time of conviction and sentencing, the judge did not have an affirmative duty to consider mitigating factors of youth. Evidentiary hearings '[a]ddressing motions challenging convictions that have long since been final would present a logistical nightmare for the courts, with the proceedings themselves potentially raising more questions than they would be able to answer.'" Geter, at, citing, Barrios-Cruz, 63 So.3d at 873. Because these cases will stem back 18 years to murders which occurred before the 1994 amendment to the statute, there will be an incredible difficulty in conducting new sentencing hearings. "Among the clear and obvious difficulties in holding new sentencing hearings in cases that were final years ago are (1) the judge who tried the case and physically saw and heard the evidence may not be

available, (2) trial transcripts may no longer be available, (3) prosecutors familiar with the case may no longer be employed with their respective office, and (4) family members who are still alive and who had to live through the trial, appeals, and postconviction motions, will be subjected to a new proceeding involving new lawyers, a new judge, stale memories, and additional appellate proceedings." Geter, at 383. Thus, "applying Miller retroactively would undermine the perceived and actual finality of criminal judgments and would consume immense judicial resources without any corresponding benefit to the accuracy or reliability of the underlying criminal case." Geter, at 383-384.

In determining that the United States Supreme Court's decision in Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), did not apply retroactively, this Court found that "[t]he new rule does not present a more compelling objective that outweighs the importance of finality." Chandler v. Crosby, 916 So.2d 728, 731 (Fla. 2005). Likewise, the new sentencing procedure required by Miller does "not present a more compelling object that outweighs the importance of finality." Additionally, the "absence of finality casts a cloud of tentativeness over the criminal justice system, benefitting neither the person convicted nor society as a whole, cutting against retroactive application of the determination in Miller." Geter at 383, citing Witt, at 925. "Because '[e]ach of the three Witt factors cuts against retroactive application[,]' Miller is not a development of fundamental

significance." Geter at 384. Accordingly, Miller is not an issue of sufficient magnitude to require retroactive application.

ISSUE IV

WHETHER THE UNITED STATES SUPREME COURT DECISION OF MILLER V. ALABAMA, 132 S.CT. 2455 (2012), APPLIES RETROACTIVELY UNDER TEAGUE V. LANE, 489 U.S. 288 (1989)? (Restated)

Standard of Review

The issue of whether Miller v. Alabama, 132 S.Ct. 2455 (2012), is applied retroactively is a question of law, and therefore is subject to de novo review.

Argument

Appellant also claims that Miller v. Alabama is retroactive under the federal test in Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). Teague is not binding on the State. Danforth v. Minnesota, 552 U.S. 264, 278-79, 128 S. Ct. 1029, 1040, 169 L. Ed. 2d 859 (2008). This Court has not adopted the Teague test, but instead relies on Witt v. State, 387 So.2d 922, 931 (Fla.1980), which was based on the considerations set forth in Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967), and Linkletter v. Walker, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1967). In fact, this Court specifically rejected the Teague test in Johnson v. State, 904 So.2d 400, 408-409 (Fla. 2005). This Court stated that “[n]ine years after we decided Witt, the United States Supreme Court began to turn away from Linkletter” Id. at 408. This Court recognized that the United States Supreme Court “adopted Teague's retroactivity analysis as its majority view.” However, this Court stated that “[a]s courts in other states have noted, state courts are not bound by Teague in

determining the retroactivity of decisions." Id. Thus, this Court held that "We continue to apply our longstanding Witt analysis, which provides more expansive retroactivity standards than those adopted in Teague." Id. at 409. Thus, this Court need not address this issue as this Court has rejected the Teague test for retroactivity.

Nevertheless, even if this Court were to examine the Miller decision under the Teague standard, petitioner would not be entitled to any relief. The United States Supreme Court has narrowed the test for retroactivity in Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), holding that a new rule will not be applied in a collateral review unless it falls under one of two exceptions. The Court stated that "[f]irst, a new rule should be applied retroactively if it places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe[,]'" and "[s]econd, a new rule should be applied retroactively if it requires the observance of 'those procedures that ... are 'implicit in the concept of ordered liberty.'" 489 U.S. at 307, 109 S.Ct. at 1073. To fall within this second exception, "a new rule must meet two requirements: Infringement of the rule must seriously diminish the likelihood of obtaining an accurate conviction," and the rule must "alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding." Tyler v. Cain, 533 U.S. 656, 121 S.Ct. 2478, 2484, 150 L.Ed.2d 632 (2001).

"A holding constitutes a 'new rule' within the meaning of Teague if it 'breaks new ground,' 'imposes a new obligation on the States or the Federal Government,' or was not 'dictated by precedent existing at the time the defendant's conviction became final.'" Graham v. Collins, 506 U.S. 461, 113 S.Ct. 892, 122 L.Ed.2d 260 (1993), citing, Teague, supra, 489 U.S., at 301, 109 S.Ct., at 1070.

The State agrees that "[t]he decision of the Supreme Court in Miller established a new rule of constitutional law." In re Morgan, 713 F.3d 1365, 1366 (11th Cir. 2013). The Eleventh Circuit addressed whether Miller was dictated by prior precedent determined that it was not. The Eleventh Circuit noted "Miller held for the first time that 'the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders.'" Morgan, 713 F.3d at 1367, citing Miller, at 132 S.Ct. at 2469. Although the Miller decision was based on the reasoning of Graham and Roper those decisions had not been extended to outside the death penalty arena and to juveniles who had committed a homicide offense. Thus, the Eleventh Circuit concluded that "[a]lthough the confluence of these two lines of precedent led to the decision in Miller, 132 S.Ct. at 2464, Miller was not dictated by these precedents." Morgan, 713 F.3d at 1367.

As to whether or not Miller placed conduct beyond the power of the lawmaker's authority to proscribe, as stated in the State's response to Issue III, "Miller did not prohibit the imposition of a sentence of life imprisonment without the possibility of parole

on minors.” Morgan, 713 F.3d at 1367-1368. “Miller changed the procedure by which a sentencer may impose a sentence of life without parole on a minor by ‘requiring the sentencer to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.’” Id. citing Miller, 132 S.Ct. at 2469. In fact, “the Court declined to consider a categorical bar on life without parole for juveniles, or at least those 14 and younger.” Id. While a new rule which prohibits a certain category of punishment of a class of offenders because of their class or status is subject to retroactive application because that “rule applies only where a class cannot be subjected to a punishment ‘regardless of the procedures followed[.]’” Morgan, 713 F.3d at 1367, citing, Penry v. Lynaugh, 492 U.S. 302, 330, (1989) abrogated by Atkins v. Virginia, 536 U.S. 304 (2002). “Such rules apply retroactively because they ‘necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal’ ‘or faces a punishment that the law cannot impose upon him.” Schriro v. Summerlin, 542 U.S. 348, 352, 124 S. Ct. 2519, 2522-23, 159 L. Ed. 2d 442 (2004) (citations omitted). “This exception appears to apply only when a new rule completely removes a particular punishment from the list of punishments that can be constitutionally imposed on a class of defendants, not when a rule addresses the considerations for determining a sentence.” Craig v. Cain, 12-30035, 2013 WL 69128 (5th Cir. Jan. 4, 2013).

"In contrast, rules that regulate only the manner of determining the defendant's culpability are procedural." Morgan, 713 F.3d 1367, citing, Schriro v. Summerlin, 542 U.S. 348, 353, 124 S.Ct. 2519, 2523, 159 L.Ed.2d 442 (2004). "New rules of procedure, on the other hand, generally do not apply retroactively. They do not produce a class of persons convicted of conduct the law does not make criminal, **but merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise. Because of this more speculative connection to innocence, we give retroactive effect to only a small set of 'watershed rules of criminal procedure'** implicating the fundamental fairness and accuracy of the criminal proceeding." Schriro v. Summerlin, 542 U.S. 348, 352, 124 S. Ct. 2519, 2523, 159 L. Ed. 2d 442 (2004) (emphasis added). In sum, "[a] new rule is substantive when that rule places an entire class beyond the power of the government to impose a certain punishment regardless of the procedure followed, not when the rule expands the range of possible sentences." In re Morgan, 713 F.3d 1365, 1368 (11th Cir. 2013).

The importance of the difference in the treatment of substantive verses procedural rules is of the utmost importance as it "reflects the interest of the state and federal courts in the finality of judgments." In re Morgan, 717 F.3d 1186 (11th Cir. 2013) (Pryor concurring). The United States Supreme Court explained that "[a]pplication of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal

justice system. Without finality, the criminal law is deprived of much of its deterrent effect." Teague, 489 U.S. at 309, 109 S.Ct. at 1074. "No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation on issues already resolved." Mackey v. United States, 401 U.S. 667, 691, 91 S.Ct. 1171, 1179, 28 L.Ed.2d 404 (1971) (Harlan, J., concurring in judgments in part and dissenting in part). Therefore, the United States Supreme Court "has limited the application of new constitutional rules on collateral review of criminal convictions to those rules that 'necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal or faces a punishment that the law cannot impose upon him.'" In re Morgan, 717 F.3d 1186, 1190-1191 (11th Cir. 2013), citing, Summerlin, 542 U.S. at 352.

The mere fact that a juvenile offender may receive a different sentence after Miller does not convert Miller into a substantive rule. "But that a different result is likely under a new rule does not make that rule substantive. Although all new constitutional rules are likely to produce different results in at least some circumstances, the Supreme Court has explained that only some of these rules apply retroactively. Substantive rules 'apply retroactively because they 'necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal' or faces a punishment that the law cannot impose

upon him[.]’” In re Morgan, 717 F.3d 1186 (11th Cir. 2013) (Pryor concurring), citing, Summerlin, 542 U.S. at 352. Judge Pryor explained that “a rule is substantive only if it is a ‘substantive categorical guarantee accorded by the Constitution, regardless of the procedures followed.’ ... No other kind of rule ‘carr[ies] a significant risk that a defendant ... faces a punishment that the law cannot impose upon him.’ ... And Miller does not implicate a substantive categorical guarantee because a juvenile offender may still be sentenced to life imprisonment without the possibility of parole after Miller.” Id. at 1191 (citations omitted). “We can only speculate about the effect of Miller in any particular case because, after that decision, juvenile offenders may still be sentenced to life imprisonment without the possibility of parole.” Id. at 1191-1192. “[W]hen the effect of a rule in any particular case is speculative, the rule is procedural.” Id. at 1191.

Thus, Miller is a procedural rule not a substantive rule, as Miller did not prohibit the imposition of a sentence of life imprisonment without the possibility of parole on a juvenile but instead, Miller changed the procedure by which a judge may impose a sentence of life without parole. Accordingly, Miller does not meet the first exception to the Teague test of retroactivity.

Secondly, Miller does not meet the second exception under Teague. “The second exception authorizes the retroactive application of ‘a small set of watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding.’” In re Morgan, 717 F.3d 1186 (11th Cir.

2013) (Pryor on rehearing), citing Schriro v. Summerlin, 124 S.Ct. 2519, 2523 (2004). However, "[t]his class of rules is extremely narrow, and 'it is unlikely that any ... 'ha[s] yet to emerge.'" Summerlin, 124 S.Ct. at 2523, citing Tyler v. Cain, 533 U.S. 656, 667, n.7, (2001). "It is thus not enough under Teague to say that a new rule is aimed at improving the accuracy of trial. More is required. A rule that qualifies under this exception must not only improve accuracy, but also alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding." Sawyer v. Smith, 497 U.S. 227, 242, 110 S. Ct. 2822, 2831, 111 L. Ed. 2d 193 (1990). In fact, the Court has stated that "a new procedural rule is 'fundamental' in some abstract sense is not enough; the rule must be one 'without which the likelihood of an accurate conviction is seriously diminished.'" Schriro v. Summerlin, 542 U.S. 348, 352, 124 S. Ct. 2519, 2523, 159 L. Ed. 2d 442 (2004), quoting Teague v. Lane, 109 S.Ct. 1060 (1989). The Court stated "**(W)e do not disparage a constitutional guarantee in any manner by declining to apply it retroactively.**" Johnson v. New Jersey, 384 U.S. 719, 728, 86 S.Ct. 1772, 1778, 16 L.Ed.2d 882 (1996) (emphasis added). As the Eleventh Circuit stated: "The lesson of all these decisions, we believe, is that the second Teague exception is so tight that very few new rules will ever squeeze through it." Howard v. United States, 374 F.3d 1068, 1080 (11th Cir.2004).

Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (Fla. 1963), is an example of a law change which was of sufficient

magnitude to require retroactive application. The right to a unanimous six-person jury was found to be retroactive as it raised a serious question to the accuracy of the guilty verdict. Brown v. Louisiana, 447 U.S. 323, 328, 100 S.Ct. 2214, 2219, 65 L.Ed.2d 159 (1980). However, the United States Supreme Court did not apply the right to a jury trial in serious criminal cases retroactively because there were no serious doubts about the fairness or the reliability of the fact finding process being done by the judge rather than the jury. DeStefano v. Woods, 392 U.S. 631, 88 S.Ct. 2093, 20 L.Ed.2d (1968). The exclusionary rule was not afforded retroactive application. Linkletter v. Walker, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965). Miranda v. Arizona, 384 U.S. 436 (1966), was not subject to retroactive application. Johnson v. New Jersey, 384 U.S. 719, 728-29, 86 S.Ct. 1772, 16 L.Ed.2d 882 (1966). Numerous cases involving the sentencing process, including death penalty cases, have not been given retroactive application. Schriro v. Summerlin, 542 U.S. 348, 349, 124 S. Ct. 2519, 2521, 159 L. Ed. 2d 442 (2004) (holding that Ring v. Arizona, 536 U.S. 584 (2002), did not apply retroactively to cases already final on direct review); Michigan v. Payne, 412 U.S. 47, 93 S. Ct. 1966, 36 L. Ed. 2d 736 (1973) (holding that the limitation established in North Carolina v. Pearce, 395 U.S. 711 (1969), to guard against vindictiveness in resentencing procedure does not receive retroactive effect); Lambriz v. Singletary, 520 U.S. 518, 521, 117 S. Ct. 1517, 1521, 137 L. Ed. 2d 771 (1997) (finding that Espinosa v. Florida, 505 U.S. 1079 (1992), which held that in a capital case

in a "weighing State" where the sentencing judge is required to give deference to a jury's advisory sentencing recommendation, then neither the jury nor the judge is constitutionally permitted to weigh invalid aggravating circumstances, was not entitled to retroactive application); Sawyer v. Smith, 497 U.S. 227 110 S. Ct. 2822, 111 L. Ed. 2d 193 (1990) (refusing to give retroactive application to Caldwell v. Mississippi, 472 U.S. 320 (1985), which had held that it was "constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere."); Beard v. Banks, 542 U.S. 406, 408, 124 S. Ct. 2504, 2508, 159 L. Ed. 2d 494 (2004) (finding that Mills v. Maryland, 486 U.S. 367, (1988), and McKoy v. North Carolina, 494 U.S. 433 (1990), which invalidated capital sentencing schemes that require juries to disregard mitigating factors not found unanimously was not required to be applied retroactively).

Likewise, Miller did not prohibit the imposition of a life without parole sentence on a juvenile, but instead, changed the procedures in which it could be imposed. Miller did not affect the accuracy of the guilty verdict. Although Miller was highly important, it was not a watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding. Instead, "[t]he Supreme Court's decision in Miller is an outgrowth of the Court's prior decisions that pertain to individualized-sentencing determinations. The holding in Miller

does not qualify as a "watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding" Craig v. Cain, 12-30035, 2013 WL 69128 (5th Cir. Jan. 4, 2013), citing Beard v. Banks, 542 U.S. 406, 408 (2004). Thus, even if this Court were to apply the Teague standard of retroactivity, petitioner would not be entitled to relief.

CONCLUSION

Based on the foregoing, the State respectfully submits the certified question should be answered in the affirmative, the decision of the District Court of Appeal holding that Miller v. Alabama does not apply retroactively should be affirmed.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of
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